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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1946

No. 461

WILLIAM GREENOUGH AND GEORGE HENRY WARREN, JR., TRUSTEES, APPELLANTS,

vs.

TAX ASSESSORS OF THE CITY OF NEWPORT; AND EDWARD L. LEAHY, TAX ADMINISTRATOR OF THE STATE OF RHODE ISLAND

APPEAL FROM THE SUPERIOR COURT OF THE COUNTY OF NEWPORT, STATE OF RHODE ISLAND

FILED SEPTEMBER 4, 1946.

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[fol. 1]

IN SUPERIOR COURT OF NEWPORT COUNTY

M. P. No. 2929

WILLIAM GREENOUGH et al., Trustees,

v.

TAX ASSESSORS OF THE CITY OF NEWPORT

PETITION FOR RELIEF FROM TAX ASSESSMENT—Filed November 9, 1944

Respectfully represent William Greenough of the City and County and State of New York and George Henry Warren, Jr. of the City and County of Newport and State of Rhode Island, in their capacity of trustees under Clauses Fifth and Sixth of the will of George Henry Warren, late of said City of New York, that they, as such trustees, are aggrieved by the assessment upon intangible property held by them as trustees aforesaid, as shown by the tax assessment made by the Board of Tax Assessors of the City of Newport, bearing date September 15, 1944, and filed in the office of the City Clerk of said City of Newport, and now, within three months of the time appointed for the payment of said tax, said trustees file this petiton for relief from such assessment, and further represent as follows:

1. That George Henry Warren, late a resident of the City, County and State of New York, died on the 3rd day of June, A. D. 1943, leaving a last will and testament dated April 19, 1943, and which, by a decree of the Surrogate's [fol. 2] Court of the County of New York, entered on the 30th day of June, 1943, was duly admitted to probate, and letters testamentary thereon were issued to your petitioners, the executors named therein; and by a decree of the Probate Court of the City of Newport, in the County of Newport and State of Rhode Island, entered on the 15th day of November, A. D. 1943, a copy of said will authenticated under the act of Congress was ordered filed and recorded, and letters testamentary in Rhode Island were issued to your petitioners, the executors named therein.

2. That said will provided in Clauses Fifth and Sixth in part as follows:

"I give and bequeath unto my executors and trustees hereinafter named or unto such of them as shall qualify and undertake the execution of this my will and unto the survivor of them and their successors the sum of Four Hundred Thousand Dollars in trust nevertheless to invest and keep the same invested and receive and collect the interest and income derived therefrom and to pay and apply the net interest and income arising therefrom to the use of my daughter Constance Whitney Warren for and during her natural life and upon and after her decease or in the ~~event~~ my said daughter shall die before me then to assign transfer and pay over the said principal sum of Four Hundred Thousand Dollars so held in trust for her as aforesaid or the securities in which the same may then be invested and I give and bequeath the same unto her then living children in equal shares and unto the issue of any child of hers who may have previously died leaving issue then surviving such issue however to take the part or share which his her or their parent would have taken if living per stirpes and ~~not~~ per capita.

"In the event however there shall be no child or children or issue of a deceased child or children of my said daughter then surviving then to hold and continue to hold the said sum of Four hundred thousand dollars upon the further trust to invest and keep the same invested and receive and collect the interest and income derived therefrom and to pay and apply the net interest and income arising therefrom to the use of my son George Henry Warren junior during his natural life [fol. 3] and upon and after his decease then to assign transfer and pay over the said principal sum of Four hundred thousand dollars or the securities in which the same may then be invested and I give and bequeath the same unto his issue per stirpes and not per capita."

"Sixth: * * * I do likewise give and bequeath to my executors and trustees hereinafter named or unto such of them as shall qualify and undertake the execution of this my will and unto the survivor of them and their successors the further sum of Two hundred thousand dollars in augmentation of and to be added to the

principal of the trust created by the fifth clause of this my will for the benefit of my daughter Constance Whitney Warren to be held and disposed of by them upon the same terms and conditions as set forth in said fifth clause."

3. That William Greenough, one of the trustees appointed in and duly qualified as such under said Clauses Fifth and Sixth respectively, is a resident of the State of New York, George Henry Warren, Jr., the other trustee named therein and duly qualified as such is a resident of said City of Newport; that Constance Whitney Warren, the beneficiary for life under said trust is a resident of the State of New York; and that all of the intangible personal property constituting the principal of said trust fund was, at the time of the death of said George Henry Warren, and on the 15th day of June, 1944, at 12 o'clock noon, and at all times since the death of said George Henry Warren was and is now located in the City, County and State of New York and never has been located in the City of Newport in the State of Rhode Island, and is and always has been b-yond the jurisdiction of the State of Rhode Island and has not received or enjoyed any benefit or protection from the laws of the State of Rhode Island.

4. That the tax assessors of said City of Newport in pursuance of an ordinance passed by the Representative Council thereof authorizing the assessment and collection of a tax [fol. 4] on the ratable real estate, tangible personalty and intangible personalty in said City of Newport proceeded to assess said tax and filed its tax roll as aforesaid, wherein there was assessed the following tax:

> Warren, George H. Jr. Trustee UW of George H. Warren for Constance Whitney Warren, Intangible Personal Property $12,500. Tax $50.

and which said tax was assessed upon the intangible personal property held in trust by your petitioners as trustees aforesaid on June 15, 1944, for the benefit of said Constance Whitney Warren of said State of New York described in Paragraph 2 hereof and which said intangible personalty on said June 15, 1944, was located in the said City of New York.

5. That on the 30th day of September, 1944, your petitioners paid said tax under protest.

6. That the assessment of said tax against said George Henry Warren, Jr. Trustee under the will of George Henry Warren is illegal, unconstitutional and void:

(1) Because the fund constituting the intangible personal property upon which said tax was assessed was owned by a non-resident testator and was, on the 15th day of June, 1944, located in the State of New York and was never in the State of Rhode Island.

(2) Because, in addition thereto, the beneficiary for life of the aforesaid trust fund and one of the trustees are residents of the City of New York.

(3) Because the trustees of said trust fund hold said trust fund, so located in the State of New York, as joint tenants, and their title and interest in said fund as such joint tenants are not severable or divisible for the purposes of taxation or otherwise, and their powers must be exercised [fol. 5] as a unit.

(4) Because George Henry Warren, Jr., as an individual resident in Rhode Island, does not, as trustee, exercise his powers as trustee in Rhode Island, nor does he, as trustee, enjoy any profits or protection from the laws of Rhode Island.

(5) Because said trust fund upon which said tax was assessed is, under the laws of the State of New York, subject to the payment of the New York income tax, and the taxation of said fund as intangible personal property in the State of Rhode Island subjects said fund to double taxation.

(6) Because the provisions of subsection Fifth of Section 9 of Chapter 30 of the General Laws of 1938, and any tax levied against the petitioners as aforesaid thereunder, or under any other provision of law in the circumstances and under the conditions aforesaid is unconstitutional and in violation of Article XIV of the Amendments of the Constitution of the United States providing that no state "shall deprive any person of property without due process of law, nor deny to any person within its jurisdiction equal protection of the law."

(7) Because the provisions of Subsection Fifth of Section 9 of Chapter 30 of the General Laws of 1938, and any tax levied against the petitioners as aforesaid thereunder or

under any provisions of law in the circumstances and under the conditions aforesaid, is unconstitutional and in violation of the provisions of Section 16 of Article I of the Constitution of the State of Rhode Island, providing that private property shall not be taken for public uses without just compensation.

[fol. 6] 7. That by reason of the above, your petitioners are entitled to recover from the City of Newport the said tax paid by them as aforesaid:

Wherefore your Petitioners pray:

(1) That judgment be given that said tax is illegal, unconstitutional and void.

(2) That judgment be given to the petitioners for the amount of the tax with penalty thereon so paid by them as aforesaid, together with interest thereon from the date of payment, together with their costs.

(3) That the members of the Board of Tax Assessors of the City of Newport who assessed said tax were John B. Sullivan, Albert C. Landers and James E. Blake, the latter now deceased, and your petitioners pray that service of process may issue according to law against said John B. Sullivan and Albert C. Landers, the surviving members of said Board.

(S.) William Greenough, George Henry Warren, Jr., Trustees u/w George Henry Warren.

[fol. 7] In Superior Court of Newport County

Order for Notice—Filed November 17, 1944

In the above entitled cause, in which the validity of a tax assessment is in question, it is hereby ordered that notice of the pendency of the above proceeding be given to the Director of the Department of Co-ordination and Finance, by leaving at the office of said Director, State House, in Providence, with said Director or someone there employed, a certified copy of this order so that said Director may appear and be heard with reference thereto if he shall see fit.

Entered as a decree of the Court this 17th day of November, A. D. 1944.

(S.) John H. Greene, Jr., Clerk.

Nove. 17, 1944. Enter: (S.) Curran, J.

[fol. 8] PROVIDENCE SC.

In Providence in said county. I have this 30th day of November, A. D. 1944 left a certified copy of the within Order at the office of Department of Coordination and Finance, in the hands and possession of a clerk there employed, within my precinct.

(S.) Vincent J. Berarducci, Jr., Deputy Sheriff.

[fol. 9] IN SUPERIOR COURT OF NEWPORT COUNTY

DEMURRER TO PETITION FOR RELIEF FROM TAX ASSESSMENT—

Filed December 13, 1944

Now comes the defendants in the above entitled cause and demur to the plaintiffs' petition, and for causes of demurrer say:

1. That William Greenough, Trustee, one of the petitioners is not and cannot be aggrieved by a tax assessed against him as trustee, because it is shown in paragraph 4 of the petition that the assessment complained of is against George Henry Warren, Jr., Trustee, and that William Greenough is not assessed.

2. That, therefore, said William Greenough, Trustee, is not a "person aggrieved on any ground whatsoever by any assessment of taxes against him" (Ch. 31, Sec. 14, G. L. 1938), and that he is improperly joined as a petitioner.

3. That said petition is otherwise vague, uncertain, indefinite and insufficient in law.

Wherefore and for divers other good causes of demurrer appearing in said petition these defendants do demur to said petition and to all matters and things therein contained and pray the judgment of this Honorable Court whether they shall be compelled to make any further or

other plea or answer to said petition, and humbly pray to be hence dismissed with their reasonable costs in this behalf most wrongfully sustained.

By their attorney,

(S.) John C. Burke, City Solicitor, Attorney for Respondents.

And the respondents hereby reserve the right to file further demurrers and/or pleas to said petition.

By their attorney,

(S.) John C. Burke, City Solicitor, Attorney for Respondents.

[fol. 10] ORDER OVERRULING DEMURRER

There appears on the jacket of the case the following entry:

December 15, 1944.

Hearing on demurrer. Demurrer overruled.

[fol. 11] IN SUPERIOR COURT OF NEWPORT COUNTY

MOTION TO STRIKE OUT WILLIAM GREENOUGH, TRUSTEE, AS ONE OF THE PETITIONERS—Filed December 20 1944

Now comes the defendants in the above entitled cause and move that William Greenough be stricken out as one of the petitioners in the above entitled cause, and for reasons allege:

1. That there is a misjoinder of parties in that William Greenough is not a proper party to said action and should be stricken out as one of the parties.

2. That William Greenough, Trustee, one of the petitioners is not and cannot be aggrieved by a tax assessed against him as trustee, because it is shown in paragraph 4 of the petition that the assessment complained of is against George Henry Warren, Jr., Trustee, and that William Greenough is not assessed.

3. That said William Greenough, Trustee, is not a "person aggrieved on any ground whatsoever by any assess-

ment of taxes against him" (Ch. 31, Sec. 14, G. L. 1938), and that he is improperly joined as a petitioner.

By their attorney,

(S.) John C. Burke, City Solicitor, Attorney for Respondents.

[fol. 12] IN SUPERIOR COURT OF NEWPORT COUNTY

RESCRIPT—Filed February 21, 1945

SULLIVAN, *J.*

Heard on Respondent's motion to strike out the name of William B. Greenough as one of the petitioners, because of misjoinder of parties; that said Greenough is not aggrieved by any tax assessed against him, as trustee, because the assessment is against George Henry Warren, Jr., trustee, and that said Greenough is not assessed; and that said William B. Greenough, trustee, is not a "person aggrieved on any ground whatsoever by any assessment of taxes against him", Ch. 31, Sec. 14, General Laws 1938, and that he is improperly joined as a petitioner.

The facts in this motion are not in dispute. The Chairman of the Board of Tax Assessors testified as to the imposition of a tax against George Henry Warren, Jr., a resident of Newport, R. I., under the will of George Henry Warren, Sr., who died a resident of New York, on intangibles for the benefit of Constance Whitney Warren, on one-half of the property held in trust. The assessment was made by virtue of Subsection 5 of Section 9, Chapter 30, General Laws, 1938. The trust estate of $25,000 was held jointly [fol. 13] by said Warren and by said Greenough, a resident of the State of New York. The tax of $50 was paid under protest by the trustees, which they seek to recover back by virtue of Section 14 of Chapter 31, General Laws 1938, on the ground that the assessment was illegal, void and unconstitutional.

Section 14 of Chapter 31, General Laws 1938, which gives to "any person aggrieved on any ground whatsoever by any assessment of taxes against him" etc. is a remedial statute and must be liberally construed. See cases under Workmen's Compensation Act, Vols. 54, 61 and 65 R. I. There can be no question but that the tax is assessed against the fund. This was so held in Clarke vs. Addelman, 26 R. I.

168. Section 4 of Chapter 486, General Laws, vests in co-trustees "title to all of the trust estate". See Edwards vs. Cardarelli, 65 R. I. 236, where the Court said: "A guardian, unlike a trustee * * * does not take legal title to his ward's personal property". Here, Warren and Greenough were appointed co-trustees to administer the estate in question; and in the case of Angel vs. Moni, 45 R. I. 186, it was held that "any action depending on the exercise of judgment or discretion on the part of the trustees requires the joint action of all". See Kramme v. Newshaw, 147 Md. 535, 128 Atl. 468. Also, Donovan vs. Miller, 112 At. 926 (Md.)

Now under the well-established principles of law concerning the assessment of taxes being against the fund, the joint ownership of the legal title of the fund by the trustees, the indivisibility of the rest constituting the estate and the duty of the trustees to act collectively, the only question remaining is whether said Greenough is a party "aggrieved on any ground whatsoever".

[fol. 14] The court in Tillinghast vs. Brown, 24 R. I. 179, a probate appeal, states the rule to be that

> "A party is aggrieved by the judgment or division when it operates on his rights of property or bears directly on his interest".

The word "aggrieved" refers to a substantial grievance, the denial of some personal property right or the imposition upon a party of a burden or obligation.

A party aggrieved is one whose pecuniary interest is directly affected by the decree; one whose right of property may be established or divested by the decree; and, quoting from Lawless vs. Regan, 128 Mass. 592:

> "In order to have a right of appeal from the judgment of the Court, it must appear that the party appealing has some pecuniary interest or some personal right which is immediately or remotely affected or concluded by the decree appealed from".

See *Roullard* vs. *McSoley*, 54 R. I. 232, at 234;

R. I. Hospital Trust Co. vs. *Hopkins*, 38 R. I. 59 at 69;

Hamilton Mfg. Co. vs. *City of Lowell*, 274 Mass. 477, 175 N. E. 73.

The Hamilton Manufacturing Co. case is a tax case where the Court held that a person aggrieved "means one whose pecuniary interests are or may be adversely affected."

The respondent contends that to allow said Greenough to continue as a petitioner will tend to becloud the issue, embarrass the respondent and confuse the Court. The Court cannot follow this reasoning against the rights which said Greenough has as a cotrustee of the fund, a part of which is being assessed. Under the provisions of the re- [fol. 15] medial Statute, Section 14 of Chapter 31 of the General Laws, 1938, it would seem to the Court that he falls within the rule of a person "aggrieved". At the most, if his name is allowed to remain as a petitioner, and if he is not entitled to become a party, it is mere surplusage; and if his name is stricken out and he is not entitled to petition the Court for redress under the statute, it is a most serious matter, as he has been denied his constitutional right.

For the above reasons, the motion to strike out is denied.

[fol. 16] In Superior Court of Newport County

Pleas—Filed December 20, 1944

1

The defendants come and defend the wrong and injury, when, etc., and say they are not guilty of the supposed grievances in said petition alleged against them, or any or either of them, in manner and form as the Petitioners have declared against them. And of this the defendants put themselves upon the country, etc.

By their attorney,

(S.) John C. Burke, City Solicitor.

2

And for a further plea in this behalf, the defendants say that the petitioners ought not to have or maintain their action against them, because, they say, that the assessment of said tax against said George H. Warren, Jr., Trustee under the will of George Henry Warren, is not illegal, unconstitutional and/or void. And this the defendants are ready to verify. Wherefore, they pray judgment if the

Petitioners ought to have or maintain their action against them, etc.

By their attorney,

(S.) John C. Burke, City Solicitor.

3

And for a further plea in this behalf, the defendants say that the petitioner and/or petitioners ought not to have or maintain their action against them because, they say, [fol. 17] that the assessment on the intangible personal estate of the petitioner, George H. Warren, Jr., Trustee, was not illegal, unconstitutional and/or in violation of the provisions of Article V of the Amendments of the Constitution of the United States as complained of by the petitioner. And this the defendants are ready to verify. Wherefore, they pray judgment if the Petitioners ought to have or maintain their action against them, etc.

By their attorney,

(S.) John C. Burke, City Solicitor.

4

And for a further plea in this behalf, the defendants say that the petitioner and/or petitioners ought not to have or maintain their action against them because, they say, that the assessment on the intangible personal estate of the petitioner, George H. Warren, Jr., Trustee, was not illegal, unconstitutional and/or in violation of the provisions of Section 16 of Article I of the Constitution of the State of Rhode Island as complained of by the petitioner. And this the defendants are ready to verify. Wherefore, they pray judgment if the Petitioners ought to have or maintain their action against them, etc.

By their attorney,

(S.) John C. Burke, City Solicitor.

And the respondents hereby reserve the right to file further plea or please to said petition.

(S.) John C. Burke, City Solicitor; Attorney for Defendants.

[fol. 18] IN SUPERIOR COURT OF NEWPORT COUNTY

STIPULATION—Filed December 14, 1944

In the above entitled cause, it is hereby agreed that the petitioners have leave to amend their petition by substituting the word Fifth for the word Sixth in line 1 of subsection (6) of paragraph 6 on page 4 of said petition and in line 2 of subsection (7) of paragraph 6 on page 5 of said petition.

(S.) Sheffield & Harvey, Attorneys for Petitioners.
John C. Burke, City Solicitor, Attorney for Respondents.

[fol. 19] IN SUPERIOR COURT OF NEWPORT COUNTY.

SUGGESTION OF QUESTION OF CONSTITUTIONALITY OF AN ACT OF THE GENERAL ASSEMBLY—Filed December 14, 1944

The petitioners in the above entitled cause hereby represent that the constitutionality of an act of the General Assembly is brought in question upon the record of said cause and so far affects the merits of the controversy that it ought to be determined by the Supreme Court before further proceedings; Wherefore they move that said cause be certified to the Supreme Court for its determination thereof.

By their Solicitors,

(S.) Sheffield & Harvey.

ORDER DENYING MOTION TO CERTIFY

December 15, 1944.

Motion to certify papers to Supreme Court denied.

[fol. 20] IN SUPERIOR COURT OF NEWPORT COUNTY

Statement of Evidence

Mr. Harvey: May it please the court, I know Your Honor is somewhat familiar with the nature of this proceeding, but for the purpose of the record I will briefly state that it is a proceeding brought under Section 14 of Chapter 31 of

the General Laws, a petition for relief from taxation made by the Board of Tax Assessors under Sub-section 5 of Section 9 of Chapter 30 of the General Laws.

The tax itself is assessed against George H. Warren junior, trustee under the will of George H. Warren for Constance Whitney Warren, intangible personal property $12,500, tax $50.

The petition recites that George H. Warren senior at the time of his death was a legal resident of the State of New York; that he died and his will was probated before the Surrogate's Court of the County of New York, and that letters testamentary were issued to George H. Warren junior and William Greenough, the executors, and that those two were appointed trustees under Sections 5 and 6 of his will; that William Greenough, one of the trustees, is a resident of New York; that Constance Whitney Warren, a beneficiary for life, is a resident of New York; that a fund constituting $12,500 was on the 15th of June, 1944, and at all times for that matter, in the State of New York [fol. 21] and was never in the State of Rhode Island; that under these conditions and from these facts the taxation of George H. Warren junior against George H. Warren junior as trustee on $12,500 worth of intangible personal property, which constituted on the 15th day of June one-half of the intangible property then held by these trustees in the State of New York is unconstitutional and void and illegal, both under the Constitution of the United States, citing Article 5 of the amendments to the Constitution of the United States, and is also in violation of the Constitution of the State of Rhode Island.

A motion was made to strike out the name of William Greenough, as trustee, which was heard by the Superior Court and denied.

I think that substantially states the essential facts in connection with the testimony which is to be introduced, and I will ask Mr. John B. Sullivan to take the stand.

[fol. 22] JOHN B. SULLIVAN sworn.

By Mr. Harvey:

1 Q. Mr. Sullivan, your full name is John B. Sullivan?
A. Yes, sir.

2 Q. You are chairman of the Board of Tax Assessors of the City of Newport?

A. Yes, sir.

3 Q. And have been for how long?

A. About 18 years.

4 Q. And you were such tax assessor in 1944?

A. I was.

5 Q. Did the tax assessors in their tax assessment roll filed with the City Clerk assess a tax against George H. Warren, trustee under the will of George H. Warren for the benefit of Constance Whitney Warren?

A. Yes, sir.

6 Q. Will you turn to your assessment?

A. Yes, sir.

7 Q. Will you read it?

A. Bill No. 8105. George H. Warren junior, trustee under will of George H. Warren for Constance W. Warren, assessment of $12,500, intangible personal property for year fiscal 1944-45.

8 Q. The amount is $50.

A. Yes.

9 Q. Does that book show whether that was paid?

A. This book would not show it.

[fol. 23] 10 Q. That was a tax assessed upon the intangible property held in trust by Mr. William Greenough and Mr. George Henry Warren junior, was it not?

A. No, sir.

11 Q. Was it not one-half of the property?

A. That property allocatable to George H. Warren junior in the minds of the assessors.

12 Q. It was one-half?

A. It was one-half, yes, sir.

Cross-examination.

By Mr. Burke:

13 Q. You did not assess any tax against Mr. Greenough?

A. No, sir.

14 Q. And as far as you were concerned, and the Board of Assessors, this assessment was made in strict conformity with the statute as you understand it?

A. It was.

Mr. Harvey: I think that is a question of law, Your Honor.

The Court: I think it is harmless. It may stand. Exception.

Petitioner's exception noted.

[fol. 24] Redirect-examination.

By Mr. Harvey:

15 Q. You did tax him as trustee under the will of George Henry Warren senior?

A. That is correct, yes, sir.

16 Q. Under the fifth clause, was it not, or don't you know?

A. Yes, that is correct.

17 Q. That represented one-half, did it not?

A. Yes, sir.

Recross examination.

By Mr. Burke:

18 Q. Mr. Harvey used the word you taxed "Him." You mean you taxed George Henry Warren?

A. Yes.

19 Q. You did not tax Mr. Greenough?

A. No, sir.

Mr. Harvey: That is a matter of law. The tax assessment speaks for itself, anyway.

Mr. Burke: I wanted the record clear.

The Court: The record is clear. Is that what the record shows, Mr. Sullivan, that it was against George H. Warren junior?

Witness: Yes, sir.

By Mr. Harvey:

20 Q. As trustee under the fifth and sixth clauses of the will of George H. Warren?

[fol. 25] A. Our record doesn't show it, but we have a transcript of the probate which does show it. I have it here.

21 Q. On one-half of the intangible personal property?

A. That is correct.

22 Q. Have you a transcript of the probate with you?

A. I have a partial transcript covering the fifth and sixth clauses, or fourth and fifth clauses.

23 Q. Have you it with you?
A. I have a transcript of it.
24 Q. You have really an abstract or summary of the provisions of the fifth clause of the will of George H. Warren?
A. I have.
25 Q. That was on the file at the time you made the assessment, or substantially at that time?
A. It was.
26 Q. And you used that as the basis for the tax against George Henry Warren?
A. In part, yes.

By Mr. Burke:

27 Q. You had other information, did you not?
A. We did.

[fol. 26] JOHN M. DRING sworn.

By Mr. Harvey:

1 Q. What is your full name?
A. John M. Dring.
2 Q. You are clerk of the Probate Court of the city of Newport?
A. That is correct.
3 Q. Have you in response to a subpoena duces tecum issued by this court brought with you the papers in the Probate Court relating to the filing of the will and the recording of the will of George H. Warren senior?
A. I have those papers.
4 Q. And this document I show you is an exemplified copy of the will and proceedings in New York before the Surrogate's Court of New York, showing the original probate of the will of George H. Warren?
A. That is correct.
5 Q. And do you know the date of the probating in New York?
A. I can find it. Admitted on June 26, 1942. That is the decree of Surrogate Delehanty.
6 Q. Was a decree entered by the Probate Court of the city of Newport ordering this filed and recorded?
A. That decree was entered.
7 Q. Have you an original decree there?

A. I have a decree taken from the judge's docket book, which stands as the record in the estate.

8 Q. And this provides, does it not, that after having signed the petition in the usual form the petition was advertised according to law?

[fols. 27-29] A. Yes. That was advertised for three successive weeks.

9 Q. That petition asks that "The undersigned pray that the accompanying authenticated copy of the will of the decedent, which operates on an estate in this city may be filed and recorded in the office of the clerk and that letters testamentary may be issued in Rhode Island to George H. Warren junior and William Greenough of New York," and that is signed by George H. Warren junior and William Greenough, executors?

A. Yes.

10 Q. And the decree reads that it is decreed that said petition be granted upon the giving of a bond of $15,000 without surety and that letters testamentary issue to George H. Warren Junior and William Greenough of the State of New York, in Rhode Island?

A. As executors in Rhode Island.

11 Q. That is signed by you as clerk?

A. Yes.

12 Q. Now, included in this exemplified copy is a copy of the will of George Henry Warren?

A. Yes, there is.

Mr. Harvey: Instead of having that read into the record; I would like to introduce a copy of it here, because I think Mr. Dring would want his papers.

The Court: All right. The copy by consent of counsel may be introduced in lieu of the original.

Copy of will marked "Petitioners' Exhibit 1".

[fol. 30] WILLIAM GREENOUGH.

By Mr. Harvey:

1 Q. Mr. Greenough, your full name is William Greenough?

A. Yes, sir.

2 Q. Where do you reside?

A. At 128 East 56th Street, Borough of Manhattan, New York City.

3 Q. You are resident of New York?

A. I am.

4 Q. And what is your occupation?

A. I am a lawyer.

5 Q. How long have you been a resident of New York and how long have you been a lawyer?

A. Well, I became a resident of New York in 1879. I was admitted to the bar in October, 1899, and I therefore have been a member of the bar for nearly 46 years.

6 Q. By his will George H. Warren appointed you and George H. Warren junior executors and trustees?

A. Yes.

7 Q. You are qualified as such, are you not?

A. In New York under the Surrogate's Court act the Surrogate issues letters testamentary to executors and letters of trusteeship to trustees and you have shown me a copy of letters of trustee-ship issued to George Henry Warren junior and myself by the Surrogate, under the will.

8 Q. That is the original certificate, is it not?

A. No, it is a copy. It is called a certificate of letters [fol. 31] of trusteeship. It is copied from the book which shows the original record under that number.

9 Q. This was dated November 4, 1943?

A. Yes, sir.

10 Q. And whether or not that has ever been revoked?

A. It has not been revoked.

11 Q. Now, did you know George H. Warren senior?

A. I did.

12 Q. How long had you known him before he died?

A. I had known him since I was married in 1907. He was my wife's uncle, and I had known him since 1907.

13 Q. And of what place was he a resident?

A. He was a resident of the State of New York. He was born there and lived there all his life.

14 Q. Was he ever a resident of Rhode Island?

A. He was not.

15 Q. Did you know his daughter, Constance Whitney Warren?

A. I did.

16 Q. How long have you known her?

A. Since 1907, and perhaps before. I knew her before I was married.

17 Q. Was she related to Mrs. Greenough?

A. She was her first cousin.

18 Q. So that you are familiar with the family?
A. I know the family history.
19 Q. Where did she live?
A. She lived with her father in New York.
[fol. 32] 20 Q. Whether or not she was a resident of New York?
A. Yes, she was a resident of New York, at least on June 15, 19—what was the date?
21 Q. 1944?
A. Yes.
22 Q. Was she ever a resident of Rhode Island?
A. No, she was not.
23 Q. You having qualified as trustee, will you tell the court what property, intangible property the trustees under the will of George H. Warren senior held on June 15, 1944?
A. The trust which affected Constance Whitney Warren held 500 shares of the capital stock of Standard Oil Company of New Jersey, which was purchased if I am not mistaken at approximately $50 a share.
24 Q. Where was that located on that day?
A. The certificate was in our safe deposit vault in the Chase National Bank, 115 Broadway, New York.
25 Q. Was any in Rhode Island?
A. It was not in Rhode Island.
26 Q. Did you as one of the trustees pay the tax that was assessed against George H. Warren?
A. Yes, sir. We paid it under protest, or asked you to.
27 Q. Is that the check with which it was paid?
A. Yes, that is the check.
28 Q. I will ask you is this the tax bill?
A. Yes, the receipted tax bill.
[fol. 33] 29 Q. And signed by Agnes Gould?
A. Yes, or somebody for her, I don't know.
30 Q. That shows the payment of a tax on October 2, 1944?
A. Plus a slight penalty, 23 cents.
31 Q. At the top of that tax bill are the words "Paid under protest" stamped?
A. Yes.

Tax bill marked "Petitioner's Exhibit 2."

32 Q. Now, coming to the check, is this the check you used for the payment of that tax?

A. Yes, sir. It is the check signed by George Henry Warren junior and myself. It states in the lower left-hand corner, "Paid under protest." A check for $50.

33 Q. That is made to the order of Agnes Gould, Tax Collector?

A. Yes, sir.

34 Q. And is stamped with "City of Newport City Treasurer" on the back?

A. It appears to have been paid to the City Treasurer by Agnes Gould, Tax Collector, and then collected through the Commercial National Bank & Trust Company of New York.

35 Q. The trustee's account was held in Manufacturer's Trust Company in New York, and who had authority to sign the checks?

A. Only George Henry Warren junior and myself.

36 Q. Did either have authority to sign checks alone? [fol. 34] A., No.

Check marked "Petitioners' Exhibit 3."

Mr. Harvey: I meant to ask Mr. John B. Sullivan to produce the protest which accompanied the check.

The Court: That may form a part of his testimony.

Protest marked "Petitioners' Exhibit 4."

37 Q. Mr. Greenough, as a practicing attorney in the State of New York are you familiar with the tax laws of the State of New York?

A. I am.

38 Q. Will you state whether or not under the laws of the State of New York you and Mr. George H. Warren Junior as trustees are in any way taxable——

Mr. Burke: Objected to, Your Honor.

The Court: Let him finish.

39 Q. —on the property held by you under the fifth and sixth clauses of the will of George H. Warren senior?

A. For the benefit of Constance Whitney Warren.

40 Q. Yes, for the benefit of Constance Whitney Warren.

Mr. Burke: I object, Your Honor. It has no relevancy in this case.

The Court: Is there an allegation they are being taxed on this property for which—the City of Newport has made [fol. 35] an assessment which is unconstitutional?

Mr. Burke: That would come up under a constitutional question.

The Court: It seems to me you have a constitutional question raised here. I think this case should go to the Supreme Court. The court does not desire to shut you off, but the statute as I read it, and the allegation of unconstitutionality in the assessment, the court feels it is of such vital importance to the city of Newport, the financial department of the city of Newport, that this matter should be certified to the Supreme Court for an opinion. There is no use sending it up piecemeal, and neither is there any use in setting it out piecemeal now and asking me to decide the question, when it is alleged in the bill that this assessment is in violation of the State and Federal Constitution and it is double taxation. It seems to the Court it will not do any harm to the Supreme Court to have Mr. Greenough express an opinion as an expert as to the allegation set out in the bill.

Mr. Burke: On the question of constitutionality, that was brought up here some time ago and the motion was denied to have the case certified. I think as far as this court is [fol. 36] concerned, the question of constitutionality cannot be interposed. You will find that Mr. Justice Joslin passed on the question and denied the motion to certify this case to the Supreme Court. I think that is the law in this case.

Mr. Harvey: There are three cases which I would like to call to the Court's attention, leaving out for the moment the question of the constitutionality, which I say is the controlling factor, and those cases hold, and one is a Massachusetts case, 224 Mass. Newcomb vs. Page, that the question of whether or not New York taxes this same property is a material question. Also in a Pennsylvania case the court observed the same thing. Those cases will have to be cited to any court which hears this case, and when the court reads it, it will see the very question, in the Massachusetts case right in there as part of the opinion, the law of New York, as to whether or not this property is taxable in New York. As to the constitutionality, Judge Joslin had passed on this but he had not heard any testimony at that time.

The Court: Doesn't that make a difference? The court feels still quite strongly without attempting to overrule Judge Joslin or go contrary to his opinion, for whom I have

[fol. 37] the greatest respect, but here is Chapter 941 of the Public Laws:

"Whenever is any proceeding, civil or criminal, in the superior court or in any district court, prior to the trial thereof on its merits, or upon a motion in arrest of judgment, any question of law shall arise, or the constitutionality of an act of the general assembly shall be brought in question upon the record, which in the opinion of the court, or in the opinion of the attorney-general, if the state be a party to such proceeding, is of such doubt and importance, and so affects the merits of the controversy that it ought to be determined by the Supreme Court before further proceedings, the court in which the cause is pending shall certify such question or motion to the supreme court for that purpose and stay all further proceedings until the question is heard and determined: Provided, that no question shall be so certified in any criminal case where the defendant has not been released on bail."

Now, how am I bound in any way? Don't you think there is a question of importance raised on the question of constitutionality?

Mr. Burke: I don't think there is any question of importance raised here, Your Honor, that justified Your Honor [fol. 38] in finding for the plaintiff except a question of a constitutional question. Mr. Harvey will present two questions, whether this tax is valid, whether there is any valid tax, and secondly, if it is valid is it constitutional. It seems to me this case may be certified and the Supreme Court may send it back.

The Court: There won't be any great harm in that.

Mr. Burke: I think the city is entitled to have this matter determined upon its merits here today. If there is a constitutional question involved, it will go in the usual course to the Supreme Court. If there is any question of the validity of the tax, outside of its constitutionality, that has to be determined in this court in the first place. If it isn't determined in the first place and if the court decides this statute is constitutional, then it may go to the Supreme Court of the United States, and they may decide it is constitutional and then it comes back here again on the validity of this assessment. I think the proper procedure in this case is to let this case be decided here today on all the questions. If the plaintiff has made out a case, he is entitled to a decision. If he has not made out a case, the city is entitled to make this assessment.

[fol. 39] The Court: The only thing in this statute leaves the matter in the opinion of the court. You substitute yourself for the court. "In the opinion of the Court." It is my opinion it is of a constitutional nature and of such doubt and importance.

Mr. Burke: If that is your opinion, that is your opinion. You have the right.

The Court: You have a statute upon which taxes have been assessed which is presumed to be constitutional. Mr. Harvey raises the constitutional question. He says it is unconstitutional and illegal, and there should not be any assessment made.

Mr. Burke: I argued this matter at great length before Mr. Justice Joslin on the question of whether or not this statute was unconstitutional. We went into the question. I showed to Judge Joslin and I can show to Your Honor that this statute has been in effect almost a hundred years in Rhode Island, and the constitutionality of it has never been questioned.

The Court: Until today.

Mr. Burke: On the line of decisions on the subject I say there is not sufficient serious doubt presented here today to justify Your Honor in saying that this case does involve [fol. 40] such doubt and importance that it should be certified to the Supreme Court, in view of the statute for over a hundred years and the number of cases that have been brought under this statute testing its validity. The question of its constitutionality was never raised until this case, as far as I know.

The Court: If you make that argument before the Supreme Court perhaps they won't take much time in deciding it should be brought back here.

Mr. Harvey: There has never been any litigation in the Supreme Court under this statute on the facts such as these. Here is a deceased person who dies a resident of New York. All his property at the time of taxation, all the property held by the trustees, was in New York. The beneficiary is a resident of New York. New York State assesses a tax on this property.

Mr. Burke: I say the statute is plain in this case. It gives the power to the tax assessors. No question about their authority. The assessors know Mr. Greenough is a resident of New York. They know this property is in New York. They know George Henry Warren is a resident of

the city of Newport, and under that statute they made this assessment, and they are justified in doing so.

Mr. Harvey: That is non sequitur.

[fols. 41-47] Mr. Burke: The statute is plain in this case. Your Honor realizes that this matter, this case involves a very serious matter and is a very important matter in this State.

The Court: The court has that in mind. That is why the court is taking this slant on it. It is very important. It is a matter which should be straightened out once and for all if it has been attacked on its constitutionality.

Mr. Burke: That will have to be decided by the Supreme Court. It is Your Honor's duty——

The Court: The only difference between the court and counsel is that counsel says I must decide the case and then have either side take it up to the Supreme Court. The court feels that it should go up there immediately upon the question, and let them decide it once and for all.

Mr. Burke: They won't decide it once and for all.

The Court: Then they will send it back, and nobody will be too seriously harmed. It is barely started, and it is not an extensive trial up to date.

* * * * * * *

[fol. 48] 44 Q. Also I would ask you if you are familiar with the laws of New York as to the title which is vested in executors and trustee under the New York laws, as to whether it is a title which vests in them a joint tenancy or a tenancy in common?

A. I am familiar with the law. The law——

45 Q. Will you read from the law?

A. The law which I refer to is Section 66 of the Real Property Law. It provides as follows:

> "Every estate granted or devised to two or more persons in their own right shall be a tenancy in common, unless expressly declared to be in joint tenancy; but every estate, vested in executors or trustees as such, shall be held by them in joint tenancy. This section shall apply as well to estates already created or vested as to estates hereinafter granted or devised."

Now, that statute, while on the real property law, has been held to apply equally to personal property. I might

say it has been so held by a court sitting in this State, reported in 23 Federal Supplement 905.

Mr. Harvey: I offer this certificate of appointment of [fol. 49] Mr. Greenough and Mr. Warren as trustees under the will of George Henry Warren senior.

Certificate marked "Petitioner's Exhibit 5."

Mr. Burke: No questions, Your Honor.

Mr. Harvey: We rest.

Motion to Dismiss

Mr. Burke: I wish to bring to Your Honor's attention that the assessment is made pursuant to Chapter 30, Section 9, Subdivision 5. The Statute has been strictly complied with in this case. George Henry Warren is a resident of Newport.. Under the terms of the statute he is taxable here, and he was taxed. The question here is whether or not this is a valid assessment.

Under the statute I contend there is no question about it. It is the duty of the assessors to assess as they did, and they did assess. Whether or not this statute is unconstitutional has to be determined by the Supreme Court. It cannot be determined here. The question of the constitutionality of this statute has been passed upon in this case by Judge Joslin, and I contend that is the law in this case. I therefore move the petition be dismissed.

[fol. 50] The Court: The motion is denied and your exception is noted.

Respondent's exception noted.

Decision re Certification to Supreme Court

The Court: After hearing the testimony in the case, as the court has already said, the question of the constitutionality of the assessment and of the statute under which it has been made having been raised in the bill and in the testimony in the case, the court feels that a question of such doubt and importance has been raised that this case should be certified to the Supreme Court. Counsel, the City Solicitor agrees that the matter should be passed upon by the Supreme Court. The question now is the way to get it there. It seems to me the court can pass upon it and then either side can go up on a bill of exceptions, or the court can certify it directly. The court feels that is the

better way, to certify it directly. If counsel will prepare the certification the court will so certify it. The exception of the respondent is noted.

Respondent's exception noted.

[fol. 51] April 2, 1945.

MOTION TO REOPEN CASE

Mr. Burke: I move to reopen the case, may it please the court.

The Court: All right, if there is no objection. Any objection?

Mr. Haire: No objection.

The Court: The motion is granted. The case is reopened.

JOHN B. SULLIVAN sworn.

By Mr. Burke:

1 Q. Mr. Sullivan, you have previously stated in this case that you are Chairman of the Board of Tax Assessors of the city of Newport?

A. Yes, sir.

2 Q. You have been for a number of years?

A. Yes, sir.

3 Q. Pursuant to the authority vested in you by the laws of this State you made the assessment which was referred to in the case before the court, the assessment as set out in Petitioners' Exhibit 2, which shows an assessment, bill No. 8105, name and address, George H. Warren, junior, trustee under the will of George H. Warren for Constance [fol. 52] W. Warren, intangible personal, $12,500, tax $50. You made that assessment?

A. We did.

4 Q. The Board of Assessors?

A. Yes, sir.

5 Q. Tell the court upon what factual information that assessment was made.

A. The records from the Probate Court sent to the assessors' office under the law showed the probating of a foreign will in the Probate Court, and a part of the record showed there were in the will——

6 Q. The will if you will tell us of whom?

A. George Henry Warren. A part of the record showed there were two trusts set up under that will, one in favor of George Henry Warren junior and the other in favor of Constance Whitney Warren. The Tax Assessors on getting that record at their office decided to investigate, and during the open sessions of the Board of Tax Assessors which began on June 16th and ended June 21, 1944, Mr. William P. Sheffield visited the office of the Tax Assessors as the representative of George Henry Warren junior, and while doing his business there the Chairman——

7 Q. George Henry Warren junior, Trustee?

A. George Henry Warren junior. While there the Chair- [fol. 53] man of the Board of Assessors asked Mr. Sheffield if he could secure any information with regard to whether or not any property had been paid into the trusts from the estate of George Henry Warren senior. Mr. Sheffield said that he would get that information if he could. The following day he returned and said that Mr. Warren junior had advised him that all of the property received by the trustees in both trusts, both trust estates, was $25,000 in each trust estate, but inasmuch as one of the trustees was not domiciled in Rhode Island, Mr. Warren felt that only one-half of the value of the property in each trust estate should be assessed. The Board of Assessors accepted that view and made the assessment in accordance with that arrangement and understanding.

8 Q. You said Mr. Warren. You mean Mr. Sheffield?

A. That was an expression from Mr. Sheffield to the Board as representing Mr. Warren's feelings in the matter.

9 Q. Did you have any other information upon which this assessment was made?

A. That is all.

10 Q. Then in substance you made the assessment on [fol. 54] one-half of the amount of the trust estate representing the ownership of George Henry Warren junior, the trustee who was a resident of the city of Newport and State of Rhode Island?

A. Yes, sir.

11 Q. And you made no assessment against the other half which was represented by William Greenough, the other trustee?

A. No, sir.

12 Q. Did Mr. Sheffield state to you at all in what fund this money was invested?

A. As I recall it, it was in a subsidiary of the Standard Oil Company of New Jersey.

13 Q. And the arrangement was agreeable to Mr. Sheffield as the representative of Mr. Warren that the assessment should be made on one-half of the amount of the trust estate, the assessment being made against George Henry Warren junior, trustee, pursuant to Chapter 30, Section 9, subdivision 5, I think it is?

Mr. Harvey: I object, Your Honor. The question is leading. That isn't so important. The testimony of the conversation has been given.

The Court: Isn't that so, Judge Burke? Isn't that a conclusion?

[fol. 55] Mr. Burke: Perhaps it is.

The Court: He can testify what was said and done. He has done that.

Mr. Burke: Very well.

14 Q. Have you any other information, Mr. Sullivan, to give the court upon the facts in this assessment?

A. No, sir.

Cross-examination.

By Mr. Harvey:

15 Q. You have no reason whatever to believe that the information to the effect that the intangible property then held by the trustees amounted to $25,000? You have no reason to believe that was not a correct statement?

A. None whatever.

Mr. Burke: The respondent rests, Your Honor.

Mr. Harvey: No further testimony.

The Court: The court is ready to decide this matter now if counsel has nothing further to say.

Mr. Harvey: I am anxious to get a quick decision in this [fol. 56] matter, but there are some cases, three cases that I would like to call to your Honor's attention. They are Newcomb vs. Page 113 N. E. 458, in re Dorrance Will, 3 Atl. 2nd. 682, and Goodsite vs. Lane, 139 Fed. 593.

Mr. Burke: The respondent wishes to cite to Your Honor the case of Petition of William J. H. Ailman and Samuel

R. Honey for an opinion, and I say that case fits this case very well.

Mr. Harvey: May I ask Your Honor in reading these cases to consider the fact that this statute has been in force for more than a hundred years, and no case has been decided and no question raised, as far as a very minute examination will show, wherein the combination of circumstances existed that exists in this case. Learned counsel on the other side cites the Ailman case, but there is an exception in that case, and the very exception takes it outside of this case. Here we have a combination of three things. We have the decedent who created this trust was a non-resident. The fund was never in Rhode Island. It was always in New York. In that case it was in Rhode Island. [fol. 57] Third, the beneficiary resides without the State.

WITHDRAWAL OF DECISION

The Court: The court will withdraw its decision sending the case to the Supreme Court for an interpretation of the statute. It will try and give decision in the matter as soon as I read the cases.

[fol. 58] I hereby certify that the foregoing is a true copy of the aforementioned case, according to my shorthand notes.

(S.) Catherine Fitzgerald, Stenographer Superior Court.

Approved and allowed:

(S.) Sullivan, J., Associate Justice Superior Court.

5/9/45.

[fols. 59-60] And, on the 10th day of November, 1943, there was filed in the office of the Probate Court, in said county of Newport, in said state of Rhode Island, the following:

PETITIONER'S EXHIBIT No. 1

WILL

I, George Henry Warren do make publish and declare this to be my last Will and Testament in manner and form following that is to say

. . . . . .

[fol. 61] Fifth. I give and bequeath unto my executors and trustees herein after named or unto such of them as shall qualify and undertake the execution of this my will and unto the survivor of them and their successors the sum of Four hundred thousand dollars in trust nevertheless to invest and keep the same invested and receive and collect the interest and income derived therefrom and to pay and apply the net interest and income arising therefrom to the use of my daughter Constance Whitney Warren for and during her natural life and upon and after her decease or in the event my said daughter shall die before me then to assign trans-[fol. 62] fer and pay over the said principal sum of Four hundred thousand dollars so held in trust for her as aforesaid or the securities in which the same may then be invested and I give and bequeath the same unto her then living children in equal shares and unto the issue of any child of hers who may have previously died leaving issue then surviving such issue however to take the part or share which his her or their parent would have taken if living per stirpes and not per capita.

In the event however there shall be no child or children or issue of a deceased child or children of my said daughter then surviving then to hold and continue to hold the said sum of Four hundred thousand dollars upon the further trust to invest and keep the same invested and receive and collect the interest and income derived therefrom and to pay and apply the net interest and income arising therefrom to the use of my son George Henry Warren junior during his natural life and upon and after his decease then to assign transfer and pay over the said principal sum of Four hundred thousand dollars or the securities in which the same may then be invested and I give and bequeath the same unto his issue per stirpes and not per capita.

Sixth. I having survived my brother Whitney Warren and the trust created for me by the will of my father having terminated I give and bequeath to my executors and trustees hereinafter named or unto such of them as shall qualify and undertake the execution of this my will and unto the survivor of them and their successors the sum of Two hundred thousand dollars in augmentation of and to be added to the principal of the trust created by the fourth [fols. 63-71] clause of this my will for the benefit of my son George Henry Warren junior to be held and disposed of by them upon the same terms and conditions as set forth

in such fourth clause and I do likewise give and bequeath to my executors and trustees hereinafter named or unto such of them as shall qualify and undertake the execution of this my will and unto the survivor of them and their successors the further sum of Two hundred thousand dollars in augmentation of and to be added to the principal of the trust created by the fifth clause of this my will for the benefit of my daughter Constance Whitney Warren to be held and disposed of by them upon the same terms and conditions as set forth in said fifth clause.

* * * * * * *

[fol. 72] Lastly. I hereby revoke and annul all other or former wills by me at any time heretofore made

In Witness Whereof I have hereunto set my hand and affixed my seal this nineteenth day of April in the year One thousand nine hundred and forty-three.

George Henry Warren. (Seal.)

Signed sealed published and declared by the testator as and for his last will and testament in the presence of the undersigned who at his request in his presence and in the presence of each other have hereunto subscribed their names as witnesses.

James C. Lawler, residing at 147 So. Oxford St., B'klyn, N. Y. John F. Blewett, residing at 603 Ishman Street, New York City. Stephen J. Mc Garrigle, residing at Glen Ridge, New Jersey.

[fol. 73] PETITIONER'S EXHIBIT No. 2

Paid Under Protest

City of Newport, R. I.

Tax Bill 1944

City Tax Assessed June 15, 1944

For the Fiscal Year, April 1, 1944 to March 31, 1945

Tax Rate on each $100.00

Real Estate	$2.45
Tangible Personal	$2.45
Intangible Personal	$ .40

Bill No.	Name and Address	Valuation Real Estate	Tang. Per.	Intang.	Personal
8105	Warren George H. Jr. Trustee u/w George H. Warren for Constance Whitney Warren				

On Real Estate and Tangible	On Tangible Personal	Tax Total
	50.00	50.00
Penalty	At 8% per annum	.23
		50.23

Agnes Gould, Tax Collector, By: K. Denniston.

[fol. 74] PETITIONER'S EXHIBIT No. 3

New York, September 25th, 1944. No. 4

Manufacturers Trust Company 1-30

55 Broad Street

Pay to the Order of Agned Gould, Tax Collector $50.00

Fifty & 00/100 Dollars

"Paid under protest"

(S.) George Henry Warren, Trustee.
(S.) William Greenough, Trustee.

George Henry Warren, Jr. and William Greenough as Trustees for Constance Whitney Warren under the 5th and 6th Clauses of the Last Will and Testament of George Henry Warren, Deceased.

[fol. 75] PETITIONER'S EXHIBIT No. 4

William Greenough of the City, County and State of New York and George H. Warren, Jr., of the City and County of Newport and State of Rhode Island, as trustees under the will of George H. Warren late of said City of New York,

deceased, for the benefit of Constance Whitney Warren of said City of New York, hereby pay under protect the tax of $50.00 on Intangibles assessed against "George H. Warren, Jr. Trustee u/w of George H. Warren" and for cause of protest say that said tax is illegal, unconstitutional, null and void in that both the said William Greenough and Constance Whitney Warren are non-residents; that the provisions of Chapter 30, Section 9, Subdivision or proportionment of the taxes between resident and non-resident trustees under the same trust is unconstitutional; that said trust is not legally or constitutionally divisible between the trustees and is in violation of Section 2 of Article IV of the Constitution of the United States of America and they hereby reserve the right to recover from the City of Newport, the amount of said tax herein paid under protest.

William Greenough, George H. Warren, Jr., Trustees u/w George H. Warren, by (S.) Sheffield & Harvey, Attorneys.

October 2, 1944.

[fol. 76] PETITIONER'S EXHIBIT No. 5

No. 57153

The People of the State of New York

To all to whom these presents shall come or may concern.

Send Greeting:

Know Ye, That, we, having inspected the records of our Surrogate's Court in and for the County of New York, do find that on the 30th day of June, in the year one thousand nine hundred and forty-three, by said Court, Letters of Trusteeship under the will of George Henry Warren, deceased, were granted unto George Henry Warren, Jr., and William Greenough, as Trustees of the trusts created by said Will, and that it does not appear by said records that said letters have been revoked.

In testimony Whereof, we have caused the seal of office of the Surrogate's Court of the County of New York to be hereunto affixed.

Witness, Honorable James A. Foley.

County of New York, in the City of New York, the 4th day of November, in the year of our Lord one thousand nine hundred and forty-three.

(S.) George Laerch, Clerk of the Surrogate's Court.
Seal of New York Surrogate Court.

HA.
(Seal)

[fol. 77] EXHIBIT B

IN SUPERIOR COURT OF NEWPORT COUNTY.

DECISION—Filed April 25, 1945

SULLIVAN, *J.*

Heard on prayer of Petitioners for relief from tax assessment under the provisions of Sec. 14, of Chapter 31, of the General Laws, 1938. The facts set out in the petition are not in dispute and show briefly that George Henry Warren, a resident and citizen of New York, died June 3, 1943, leaving a will, which was duly admitted to probate in New York, and letters testamentary were issued to the Petitioners June 30, 1943, they being the executors named therein; that a copy of said will was filed in the Probate Court of Newport and letters testamentary in Rhode Island were issued to said Petitioners. Then comes the recital of the fifth and sixth clauses of the will giving to the executors and trustees named in said will Four hundred thousand dollars in trust for the benefit of testator's daughter, Constance Whitney Warren, for life. Paragraph sixth provides for a further addenda of Two hundred thousand dollars to be added to the original trust on the same terms and conditions; that said Greenough and Constance Whitney Warren are both residents of New York, while George Henry Warren, Jr., the other trustee, is a resident of Newport; that [fol. 78] the whole of the trust estate is now and has at all times been located in the City, County and State of New York; that the Respondents assessed George Henry Warren, Jr. upon intangible personal property held in trust by said Petitioners as trustees, on June 15, 1944, for the

benefit of Constance Whitney Warren, described in paragraph 2 of said petition as follows:

> Warren, George H., Jr., Trustee, U.W. of George H. Warren, Intangible Personal Property $12,500, Tax $50.

This tax was paid under protest and the Petitioners contend that said assessment is illegal, unconstitutional and void; (1) Because the property assessed was owned by a non-resident testator and was located in the State of New York and never located in Rhode Island; (2) Because the beneficiary for life and one of the trustees are residents of New York; (3) Because said trust fund is held by said trustees as joint tenants, their interest in said fund being not severable or divisible and their powers must be exercised as a unit; (4) Because Petitioner Warren, as a resident of Rhode Island, does not as trustee exercise his powers as trustee in Rhode Island and enjoys no protection or profit from this State; (5) Because said trust fund, on which said tax was assessed, is subject to the payment of the New York Income Tax, thereby resulting in double taxation; (6) Because Sub-section Fifth of Section 9, of Chapter 30, General Laws, 1938, under which said tax was levied is unconstitutional and in violation of Article V of the Amendments of the Constitution providing that no State "shall deprive any person of property without due process of law, nor deny to any person within its jurisdiction equal protection of the law;" (7) Because Sub-section Fifth of [fol. 79] Section 9, of Chapter 30, of General Laws, 1938, and said tax levied against Petitioners is unconstitutional under provisions of Section 16, of Article I of the Constitution of Rhode Island, providing that no property shall be taken for public uses without just compensation.

The petition concludes with the prayer that said tax be declared illegal, unconstitutional and void; that judgment be given for the amount of the tax paid with penalty, interest and costs.

The Petitioners substantiated their allegations of fact by calling the Chairman of the Board of the Tax Assessors, the Clerk of the Probate Court of Newport and one of the Petitioners, William Greenough, an attorney of the New York Bar, who qualified as an expert and testified to the law of the State of New York on taxation applicable to the

facts in this case. The Chairman of the Board of the Tax Assessors was recalled by the Respondent and gave testimony as to further information he had received regarding the trust estate and value of the same.

The question raised by the petition, the plea and the evidence is purely one of law, no material fact being in dispute. In support of Petitioners' Contention, they have submitted for the Court's consideration the cases of *Goodsite* vs. *Lane*, et al, 139 Fed. 592; *Newcomb* vs. *Page*, 113 N. E. 458 and *In re Dorrance Will*, 3 At. 2nd. 682. These cases have much persuasive force but the issue raised in this case by the pleadings is whether the Statute under which the assessment was made is constitutional. In the case of *Payne & Butler* vs. *Providence Gas Company*, 31 R. I., 295 at page 313, the Supreme Court said:

> [fol. 80] "There is only one body that is authorized to interpret the statutes of this State with the view of determining their constitutionality. Under article XII of the amendments to the constitution of the State, adopted in November, 1903, section 1: 'The supreme court shall have final revisory and appellate jurisdiction upon all questions of law and equity.' Furthermore, a statute is constitutional or not, as the case may be, without reference to the interpretation of any board or boards of commissioners. It is deemed to be constitutional until this court shall have decided that it is not."

In the case of *Fritz* vs. *Presbrey* et al., 44 R. I. 207, our Court quoted from the East Shore Land Co. vs. Peckham, 33 R. I. 541, as follows:

> "'All statutes are presumed to be valid and constitutional and the burden of proving the unconstitutionality of any statute is upon the party raising the question; furthermore, the rule is that he must prove it beyond a reasonable doubt.'"

The Court, a little further on in the same case, quotes from Wellington et al., Petitioners, 16 Pick. 87 from the opinion of Chief Justice Shaw as follows:

> "'When called upon to pronounce the invalidity of an act of legislation passed with all the forms and solemnities requisite to give the force of law, courts will approach the question with great caution, examine

it in every possible aspect and ponder upon it as long as deliberation and patient attention can throw any new light on the subject, and never declare a statute void unless the nullity and invalidity of the act are placed in their judgment beyond a reasonable doubt.' "

The assessment in question was made in strict compliance with Sub-section Fifth, of Section 9, of Chapter 30, of the General Laws, 1938, and there is nothing in the proof offered to justify the Court in saying that the tax assessors deviated in one iota in this assessment from the law as laid down in the above-mentioned statute. The petition is therefore denied.

[fol. 81] In Superior Court of Newport County

Petitioners' Bill of Exceptions—Filed May 3, 1945

The petitioners in the above entitled cause come and file their bill of exceptions and say that said cause was tried in the Superior Court at Newport before Mr. Justice Sullivan sitting without a jury on the 28th day of March and the 2nd day of April, A. D. 1945 and a decision was rendered on the 25th day of April, A. D. 1945 for the respondents denying the relief asked for in said petition and that certain exceptions were taken by the petitioner as follows:

First: To the Court's ruling allowing Q. 14 appearing on page 5 of transcript, the exception to said ruling appearing on page 5 of the transcript.

Second: To the decision of said Court by rescript filed April 25, 1945, denying the petition.

And the petitioners insist that each of said rulings constituted error prejudicial to them and that said error entitled them to a new trial or to have judgment entered in their favor.

Wherefore the petitioners tender this, their bill of exceptions and pray that the same may be allowed by the Court in accordance with law.

By their attorneys,

(S.) Sheffield and Harvey.

Approved & Allowed, Sullivan, J.
5/9/45.

[fol. 82] IN SUPREME COURT OF RHODE ISLAND

MOTION FOR LEAVE TO AMEND PETITION—Filed October 31, 1945

The Petitioners in the above entitled cause hereby move that they be allowed to amend the original petition filed in this cause in the Superior Court by striking out in Subsection (6) in Section 6 of said petition the Roman numeral V and substituting therefore the Roman Numeral XIV so that the same shall read as follows:

"(6) Because the provisions of subsection Fifth of Section 9 of Chapter 30 of the General Laws of 1938, and any tax levied against the petitioners as aforesaid thereunder, or under any other provision of law in the circumstances and under the conditions aforesaid is unconstitutional and in violation of Article XIV of the Amendments of the Constitution of the United States providing that no state 'shall deprive any person of property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law.'"

(S.) William Greenough, George Henry Warren, Jr., by their attorneys, (S.) Sheffield & Harvey.

And on the 31st day of October, A. D. 1945, the foregoing motion was filed and granted.

[fol. 83] There appears on the jacket of the case the following entry:

Supreme Court 1945 May 12. Filed.
October 31, 1945.

Petitioner's motion to amend petition granted.
Motion of Attorney General to intervene granted.

[fol. 84] IN SUPREME COURT OF RHODE ISLAND

OPINION—Filed May 31, 1946.

BAKER, J.:

This is a petition for relief from the assessment of a tax and is brought under general laws 1938, chapter 31, #14. The petitioners are seeking to recover the tax heretofore paid by them under protest, the basis of their petition being that the tax in question was illegally and unconstitutionally assessed against one of them. The matter was heard in the superior court by a justice thereof sitting without a jury. He rendered a decision denying and dismissing the petition. A bill of exceptions containing two exceptions, one to the decision and another which is not now pressed, was thereafter prosecuted to this court by the petitioners and is now before us for consideration.

The evidence shows the following pertinent facts, among others. The petitioners, William Greenough and George Henry Warren, Jr., are the duly qualified executors and cotrustees under the will of George Henry Warren, who died June 3, 1943 and who was a resident of the city of New York. That will was duly admitted to probate by a decree of the surrogate's court of the county of New York entered June 30, 1943, and letters testamentary were issued to the petitioners. A copy of the will, authenticated under the act of Congress, was also ordered filed and recorded, and letters testamentary in Rhode Island were issued to the [fol. 85] petitioners by a decree of the probate court of the city of Newport in this state entered November 15, 1943.

Under the fifth clause of the will the petitioners were bequeathed the sum of $400,000 to be held by them in trust to pay the net income therefrom, in the first instance, to the testator's daughter Constance Whitney Warren for and during her natural life. The clause then contained other and further provisions respecting said sum and the income therefrom in the event of the taking place of certain contingencies not now material to the issues before us. By the sixth clause of the will the testator also bequeathed to the petitioners the further sum of $200,000 "in augmentation of and to be added to the principal of the trust created by the fifth clause of this my will for the benefit of my daughter Constance Whitney Warren to be held and

disposed of by them upon the same terms and conditions as set forth in said fifth clause".

Further, it appears from the evidence that the testator's daughter, Constance Whitney Warren is a resident of the state of New York; that the petitioner and trustee William Greenough is likewise a resident of that state; but that the petitioner and trustee George Henry Warren, Jr. is a domiciled resident of the city of Newport in this state. It is not disputed that at the time of the death of the testator and on June 15, 1944 at 12 o'clock noon, which was the time of the assessment of the tax involved in this proceeding, and at all times up to the hearing in the superior court, all of the intangible personal property constituting the principal of the above-mentioned trust fund was located in the city of New York and never has been located in this state.

[fol. 86] It is admitted that the tax in question was assessed by the respondents under the provisions of G. L. 1938, chap. 30, #9, subsec. fifth, which is as follows: "Intangible personal property held in trust by an executor, administrator, or trustee, whether under an express or implied trust, the income of which is to be paid to any other person, shall be taxed to such executor, administrator, or trustee in the town where such other person resides; but if such other person resides out of the state, then in the town where the executor, administrator, or trustee resides; and if there be more than one such executor, administrator, or trustee, then in equal proportions to each of such executors, administrators, and trustees in the towns where they respectively reside."

According to the evidence a tax of $50 for the fiscal year 1944 to 1945 appears on the assessment roll of the city of Newport as follows: "George H. Warren junior, trustee under will of George H. Warren for Constance W. Warren, assessment of $12,500, intangible personal property". The uncontradicted evidence shows that, according to information given the tax assessors of Newport, prior to the above assessment, by an attorney at law representing the trustee George Henry Warren, Jr., $12,500 was one half of the sum held by the trustees on the date of the assessment as the then *corpus* of the aforesaid trust created under the fifth and sixth clauses of the testator's will.

The respondents argue that the petition was correctly denied and dismissed by the superior court because it could

not properly be brought in its present form under #14, and also because the petitioners were not entitled to recover the tax which they had paid, in view of the facts appearing [fol. 87] in evidence respecting the nature of such payment. These defenses were not set out by the respondents in any of their pleadings, were not brought to the attention of that court and apparently are raised for the first time in argument before us. Because of our ultimate disposition of the present petition, it is not necessary for us to pass upon the above questions and we shall, for the purposes of this case only, assume that the petition is properly brought and that the petitioners are not prevented from recovering the tax in question merely by reason of the evidence relating to the manner of its payment.

In support of their position, the petitioners contend that, properly construed, subsec. fifth of #9 has not application to the facts and circumstances disclosed by the evidence, and therefore that the tax appearing on the assessment roll of the city of Newport, as hereinbefore set out, is illegally assessed and is void. The petitioners also make the further argument that if the above statute is held to be applicable, then it is unconstitutional under Section 1 of article XIV of the amendments to the Constitution of the United States and under sec. 16 of art. I of the constitution of this state.

On the other hand, the respondents maintain that the only question for this court on the present record is the constitutionality of subsec. fifth of #9 under the above-mentioned provisions of the constitution of the United States and the constitution of this state. They urge that the question of the applicability of the state statute was not before, and was not decided by, the superior court and is not properly before us.

While the record of the hearing before the superior court [fol. 88] is not as clear and definite on that issue as is desirable, nevertheless we have come to the conclusion that such question was before that court and was decided by it adversely to the petitioners. After testimony had been taken setting out the material facts, the trial justice filed a rescript which ended in the following language: "The assessment in question was made in strict compliance with Sub-section Fifth, Section 9, of Chapter 30, of the General Laws, 1938, and there is nothing in the proof offered to justify the Court in saying that the tax assessors deviated in

one iota in this assessment from the law as laid down in the above-mentioned statute."

If this language cannot properly be construed as a finding that the statute was applicable, then in our opinion the trial justice was making no finding whatever since he showed in his rescript that he was aware that he had no authority to pass on the constitutionality of such statute, and no facts were in dispute. In our judgment we should not assume that he was filing a meaningless rescript. The only issue therefore on the present record which the superior court had jurisdiction to decide involved the applicability of the statute in question.

Whether or not subsec. fifth of #9 is applicable to the facts of the instant case merits careful consideration. We find nothing in the express provisions of the clause which in our opinion prevents it applicability. There is, at least, a direct authorization to the taxing body to impose a tax on the intangible personal property held by any resident trustee, and a direction as to the place and manner of levying [fol. 89] such a tax. The language used is simple and without ambiguity. The subsection is broad in its scope and there are no express exceptions or words of limitation employed. Resident trustees of trust originating in another jurisdiction are not specifically or by implication excluded from the operation of the subsection. In fact, the general assembly, in our opinion, has in the statute shown its intent that intangible personal property, wherever located, when in the possession of such resident trustees, is taxable in this state according to the terms thereof. Unquestionably in such matters the policy of the law is controlled and fixed by the legislative not the judicial branch of the state government.

The petitioners do not question the fact that the letter of the statute was followed by the respondents in assessing the tax involved here. The statute in substantially its present form has been construed by this court in several cases. See *Anthony v. Caswell*, 15 R. I. 159; *Ailman & Honey, Petitioners*, 17 R. I. 362. In the first of these the court held that the provisions of a statute in the language of the statute now before us did not permit a *nonresident* trustee, who had no property in this state, to be taxed in the town in this state where his *cestui que* trust resided.

In the second of the cases, however, the court upheld the tax assessed in Newport against the trustee there resident, who held in trust mortgages on real estate in Newport, but

who was appointed by a South Carolina court under the will of a deceased resident of that state. The *cestui que* trust who was entitled to the income of the trust estate resided in New York. Perhaps the tax in that case and the applicability of the statute to those facts can be more readily [fol. 90] supported than can the tax in the instant case because the trustee in that case had invested part of the trust estate in mortgages in Newport property, to which fact the court specifically referred in its opinion, whereas all the trust estate in the present case is located in New York. However, a careful consideration of the opinion leads us to the belief that in principle it fully supports the position that the taxing statute is applicable to the facts of the case now before us.

For example, in the *Ailman & Honey* case the court used the following language at pages 364, 365: "There is no question of the right of the State to put all property within its jurisdiction under contribution for necessary revenue. • • • In the case before us, the legal owner resides here, and he has invested a part of his trust estate here; so that the situs of the property is doubly fixed. The fact that the authority of the trustee comes from another State does not change the fact of his residence and legal title within this State; nor the fact that the property taxed is here, by reason of its investment in loans secured by mortgages within this State, which run to the trustee." (Italics ours.)

The court thus clearly holds that the fact that the trustee, the legal owner of the trust property, resides in this state fixed here for our tax purpose the *situs* of the trust property held by him in so far as intangible personal property is concerned. It is well settled that ordinarily a trustee is considered for taxation purposes to be the owner of the property which he holds in trust. The court so held in *Anthony v. Caswell, supra,* saying, at page 161: "The statute, following the common rule, clearly recognizes executors, administrators, and trustees as the owners, for the purposes [fol. 91] of taxation, of the property held in trust by them." The *situs* of intangible personal property for the imposition of a tax is at the domicile of such owner. *Edwards v. Cardarelli,* 65 R. I. 236.

We find, therefore, that, aside from any question of constitutionality, the provisions of subsec. fifth of #9 are applicable to the facts of the instant case, and that the tax assessed against George Henry Warren, Jr., as trustee

is to that extent valid and is not beyond the scope and authority of the statute.

Since this issue of applicability is largely governed, at least as far as we are concerned, by the principles laid down in our own cases as above indicated, it ordinarily would not be necessary to discuss authorities from other jurisdictions. The petitioners, however, have cited several cases upon which they strongly rely and we will refer to certain of them briefly. In these cases, on facts somewhat similar to those in the present case, it was held that the tax under consideration was improperly assessed. In our opinion they are distinguishable from the case now before us.

In *Newcomb* v. *Paige*, 224 Mass. 516, the court applied the principle of interstate comity and also found, at page 519, that a particular sentence in the Massachusetts taxing act "is some indication of a legislative purpose that a trust fund lawfully within the taxing jurisdiction of another State and there making a just contribution to the support of government, should not be made liable to another tax here." In the present case we perceive no indication of any such legislative purpose in our own act but, as we have stated, find from its language a directly contrary intent. In the *Ailman & Honey* case this court said, at page 364, referring [fol. 92] to the trust fund before it: "If it be thus liable to double taxation, here and elsewhere, that has to do with the policy of the law, over which we have no control."

In *Dorrance's Estate*, 333 Pa. 162, the court, in arriving at its decision, construed the language of the taxing statutes, in respect to the ownership, holding or possession of trust property, narrowly and also pointed out that the statute contained no provision for dividing such trust property among resident and nonresident trustees for the purpose of assessing the tax. Our statute, on the other hand, has a specific provision allowing proportionate taxation as to resident trustees.

Harrison v. *Com'r. of Corps. & Taxation*, 272 Mass. 422, involved the imposition of the Massachusetts income tax on trust estates originating and administered outside of that state, certain of the trustees, however, being residents therein. In refusing to allow the tax the court, at page 428, stated: "The principle, that the situs of intangible property held in trust, in the absence of other controlling factors follows the person of the trustee, becomes inapplicable because by a dominating law its situs is fixed in the

place where the testamentary trust was created and established and is being administered under direction of its court. For all purposes incident to the cases at bar, its situs is immovably established within the State where the testamentary trust of which it is a part is being administered." Such a holding in our opinion appears to be contrary in principle to the views already expressed by this court and so understood cannot be followed by us. We find no controlling factor which takes the instant case out of the general rule [fol. 93] respecting the *situs* of intangible personal property held in trust.

The petitioners also advance the argument that subsec. fifth, #9, should not be applied to the facts of this case because under the law of New York trustees have title to the trust property as joint tenants and must act as a unit in administering the trust. Although this fact is referred to in support of the decision in some cases, particularly in Massachusetts, we do not understand why it should, in and of itself, prevent the imposition by this state of a tax under subsec. fifth, #9, other requirements of that statute being complied with. The fact that such is the law in New York, where this trust was created, should not in our opinion be held to alone prevent the imposition of a tax by this state, if assessed on persons or property within its jurisdiction, unless such tax is held to be unconstitutional.

Finally, the petitioners contend that if subsec. fifth, #9, is found to be applicable to the facts herein, such clause is unconstitutional as being contrary to the "due process" clause of the constitution of the United States and to sec. 16 of Art. I of the constitution of this state, which prevents the taking of private property for public uses without just compensation.

Before we deal with this contention it should be determined whether or not it is properly before us. At the outset it should be noted that in this civil proceeding only the unconstitutionality of an act of the general assembly is brought in question upon the record and that no constitutional question of any other nature or kind is raised. That being so the provisions of G. L. 1938, chap. 545, as amended, apply. Section 1 of that chapter was repealed by P. L. 1940, chap. [fol. 94] 941, sec. 1, and #6 of chap. 545 was amended by sec. 2 of chap. 941 to read as follows: "Whenever in any proceedings, civil or criminal, in the superior court or in any district court, prior to the trial thereof on its merits,

or upon a motion in arrest of judgment, any question of law shall arise, or the constitutionality of an act of the general assembly shall be brought in question upon the record, which in the opinion of the court, or in the opinion of the attorney-general, if the state be a party to such proceeding, is of such doubt and importance, and so affects the merits of the controversy that it ought to be determined by the supreme court before further proceedings, the court in which the cause is pending shall certify such question or motion to the supreme court for that purpose and stay all further proceedings until the question is heard and determined * * *."

Under #1 of chap. 545, now repealed, the procedure involving certification of such questions before trial was relatively simple. Upon consideration we are of the opinion that in repealing 1 of chap. 545 and by amending #6 of that chapter as above set out it was not the intention of the general assembly to prevent entirely, in a civil case, the certification of constitutional questions of the kind now before us in instances where a justice of the superior court has refused to exercise his discretion in favor of immediate certification. In our opinion the object of sec. 2, chap. 941, P. L. 1940, was merely to give a justice of the superior court in the ordinary civil proceeding discretion in the matter of certifying to the supreme court such constitutional questions prior to the trial of the case, where previously such certification was mandatory. As we view it, the issue, on a [fol. 95] motion to certify under #6 as amended, is merely the time of certification and the refusal to certify immediately is not a final disposition of the motion. In our judgment such a motion when once made, if denied in the first instance, nevertheless remains alive until after the case is fully heard and determined, when it comes before us automatically and without further action, in the event a bill of exceptions or appeal is prosecuted to this court by either party.

While 6 as amended does not expressly provide for the above procedure, nevertheless in our opinion it may reasonably be implied therein in the interest of uniform practice and in the preservation of the right of certification under the above circumstances. Such a procedure in effect would be substantially analogous to that specifically provided for in #2 of chap. 545 in respect to the certification of this kind of a constitutional question in a criminal case. There it is

expressly provided that the decision of such question be reserved, that the trial of the case proceed to a determination as if the statute were constitutional, and that then, if the defendant is found guilty, the constitutional question raised is to be certified forthwith to the supreme court.

In the instant case the record shows that prior to the hearing in the superior court a motion was made to certify the constitutional question raised herein to the supreme court. Under our interpretation of the statute, as above set forth, the denial of that motion merely delayed the time of certification until the case came here on petitioners' exceptions after final hearing and decision. The certification of the constitutional question therefore is automatically before us for consideration and decision.

[fol. 96] The petitioners admittedly do not claim unconstitutionality on the ground of double taxation. It has recently been held that such taxation is permissible. See *Curry* v. *McCanless*, 307 U. S. 357; *State Tax Com. of Utah* v. *Aldrich*, 316 U. S. 174. The petitioners do urge as a valid ground for their claim that the state renders no equivalent for the tax against George Henry Warren, Jr. as trustee, and renders no protection and extends no benefit to the trust fund. This general test of constitutionality is based by them on the following language used in the majority opinion in *State Tax Comm. of Utah* v. *Aldrich, supra*, at page 181: "In line with our recent decisions • • • we repeat that there is no constitutional rule of immunity from taxation of intangibles by more than one State. In case of shares of stock, 'jurisdiction to tax' is not restricted to the domiciliary State. Another State which has extended benefits or protection, or which can demonstrate 'the practical fact of its power' or sovereignty as respects the shares • • • may likewise constitutionally make its exaction."

The petitioners maintain that in the instant case the above requirement is not met. We are of the opinion that it is. While it is true that nothing appears on the record to show that this state has as yet actually extended any specific benefit to or protection over the resident trustee or the trust fund, other than by the decree of the probate court of Newport hereinbefore mentioned, nothing indicates that the state is not ready, willing and capable of doing so if requested. We know of nothing in our statutes or decisions

which is of a discriminatory nature respecting a resident trustee of a trust originating in another state. Such trustee, in our opinion, would be entitled to the same benefits and [fol. 97] protection from the laws of this state as would any other natural person here resident.

But, however that may be, we are satisfied that the state can demonstrate the practical fact of its power or sovereignty over the resident trustee and through him over the trust fund which he holds. In the *Curry* case, *supra*, at page 366, the court states that rights to intangibles "are but relationships between persons, natural or corporate, which the law recognizes by attaching to them certain sanctions enforceable in courts. The power of government over them and the protection which it gives them cannot be exerted through control of a physical thing. They can be made effective only through control over and protection afforded to those persons whose relationships are the origin of the rights. • • • Obviously, as sources of actual or potential wealth—which is an appropriate measure of any tax imposed on ownership or its exercise—they cannot be dissociated from the persons from whose relationships they are derived." And at page 372 the court used the following language: "In effecting her purposes, the testatrix brought some of the legal interests which she created within the control of one state by selecting a trustee there and others within the control of the other state by making her domicile here."

Since a question involving the taxation of trustees and trust funds was raised in the *Curry* case, it is clear that the above general principles respecting intangibles were intended to apply as well to trusts and trustees as to ordinary ownership of that class of property. Further, those principles are stated in such broad and comprehensive terms in the cited cases that in our opinion it was intended that they should apply even though the actual evidences of the intangible property might not be in the taxing state. Thus [fol. 98] in the instant case, in our opinion, the residence in this state of the trustee George Henry Warren, Jr. gives it such power and sovereignty over him as trustee that, in proper proceedings, he would become amenable to the laws of this state and to the orders of its course, and likewise he would be afforded such benefit and protection, as trustee, as could properly be accorded him. In our

judgment the above test, when applied to the constitutionality of our taxing statute, is therefore satisfied by the facts shown.

A rule is enunciated in *Goodsite v. Lane*, 139 Fed. 593 (1905), cited by the petitioners, to the effect that for a tax on intangibles assessed against a resident trustee to be valid and constitutional he must be exercising his office of trustee within the state and enjoying as trustee privileges of value to the estate for which it is just the estate should pay. This rule, in our opinion, would be difficult of application if it appeared that the resident trustee exercised his office within the state only occasionally, or at different periods during a given year, and frequently that he did not so exercise his office at all. In any event, however, such rule, as we see it, is superseded and is no longer operative, because of the views expressed and the general principles set out by the supreme court of the United States regarding the taxation of intangibles in the recent cases of *Curry v. McCanless* and *State Tax Comm. of Utah* v. *Aldrich, supra*, and others.

We therefore find that subsec. fifth, #9, is not contrary to the provisions of section 1 of art. XIV of the amendments to the constitution of the United States or to sec. 16 of art. 1 of the constitution of this state, but is valid and constitu- [fol. 99] tional, and that the tax involved herein, under all the facts and circumstances, was properly assessed by the respondents against George Henry Warren, Jr., as trustee. The trial justice did not err in denying and dismissing the petition.

The petitioner's exceptions are overruled, and the case is remitted to the superior court.

[fols. 100-121] In Superior Court of Newport County

Order Entering Judgment for Defendants—Filed July 2, 1946

Now, after rendition by the Supreme Court of an opinion overruling the petitioners' exceptions to the decision of this Court denying the petition for relief from a tax assessment, and after remission of this cause to this Court, it is hereby

ordered that said petition is denied, and that judgment be entered for the defendants.

Enter:

(S) Cappelli, J. July 2, 1946.

Entered as an order of this Court this 2nd day of July, 1946. (S) John H. Greene, Jr., Clerk.

[fol. 122] IN SUPERIOR COURT OF NEWPORT COUNTY

PETITION FOR ALLOWANCE OF APPEAL, ASSIGNMENT OF ERROR AND PRAYER—Filed August 7, 1946

To the Presiding Justice of the Superior Court of the State of Rhode Island:

Considering themselves aggrieved by the final judgment of the Superior Court for the County of Newport entered after the opinion of the Supreme Court overruling the petitioners' exceptions to the decision of a Justice of the Superior Court denying and dismissing their petition for relief and the entry of judgment against them in the above cause, the Petitioners, William Greenough and George Henry Warren, Jr., Trustees under the will of George Henry Warren, hereby pray an allowance of appeal from the said decision and judgment to the United States Supreme Court and an order fixing the amount of the supersedeas bond.

And the said William Greenough and George Henry Warren, Jr., Trustees, as aforesaid, assign the following error in the records and proceedings in said cause.

That the Superior Court for the County of Newport erred in entering a final judgment for the defendants in said cause;

That the Supreme Court of Rhode Island erred in holding and deciding, as stated in the opinion filed in said cause on May 31, 1946, that subsection Fifth, Section 9 of Chapter 30 of the General Laws of Rhode Island, 1938, is not contrary to the provisions of Section 1 of Article XIV of the Amendments to the Constitution of the United States, but held that the same is valid and constitutional as applied to George Henry Warren, Jr., one of the two trustees, [fol. 123] and that the tax involved in said cause under all

the facts and circumstances was properly assessed by the respondents as Tax Assessors of the City of Newport against George Henry Warren, Jr., as co-trustee, because he was a resident of Rhode Island. The validity of said section was denied and drawn in question by the petitioners throughout the proceeding in said cause on the ground of its being repugnant to the Constitution of the United States and in contravention thereof, for the reason that the State of Rhode Island renders no equivalent for the tax on one-half of the fund assessed against George Henry Warren, Jr., as trustee, and renders no protection and extends no benefit to the trust fund.

For such error, the petitioners, William Greenough and George Henry Warren, Jr., Trustees under the will of George Henry Warren, pray that said judgment entered in the Superior Court for the County of Newport be reversed and a judgment ordered in favor of the petitioners and for costs.

No previous application for this relief has been made to any court or judge.

By their attorneys,

(S.) William R. Harvey, William Greenough.

[fols. 124-131] In Superior Court of Newport County

Order Allowing Appeal—Filed August 7, 1946

The appellants in the above entitled suit and each of them having prayed for the allowance of an appeal in this cause to the Supreme Court of the United States from the judgment made and entered in the above entitled suit by the Superior Court of the County of Newport and State of Rhode Island, on the 2nd day of July, A. D. 1946, and from each and every part thereof and having presented and filed their petition for appeal, assignment of errors, prayer for reversal and statement as to jurisdiction, pursuant to the statutes and rules of the Supreme Court of the United States in such case made and provided:

It is now here ordered that an appeal be and the same is hereby allowed to the Supreme Court of the United States from the Superior Court of the State of Rhode Island in the above entitled cause, as provided by law, and it is further ordered that the Clerk of the Superior Court for the

County of Newport shall prepare and certify a transcript of the record, proceedings and judgment in this cause and transmit the same to the Supreme Court of the United States so that he shall have the same in said court within forty (40) days from this date.

And it is further ordered that surety for costs on appeal be fixed in the sum of $1000.00.

Dated August 7, 1946.

(S.) Jeremiah E. O'Connell, Presiding Justice of the Superior Court of the State of Rhode Island.

[fol. 132] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 133] In the Supreme Court of the United States

Statement of Points to be Relied Upon and Designation of Parts of Record to be Printed—Filed September 3, 1946

Pursuant to subdivision 9 of rule 13 of the rules of the Court, the appellants state that the points on which they intend to rely are as follows:

That the Superior Court for the County of Newport of the State of Rhode Island erred in entering a final judgment for the defendants in said cause.

That the Supreme Court of the State of Rhode Island erred in holding and deciding, as stated in its opinion filed in said cause on May 31, 1946, that Subsection fifth, section 9 of Chapter 30 of the General Laws of Rhode Island, 1938 is not contrary to the provisions of Section 1 of Article XIV of the amendments to the Constitution of the United States, but held that the same is valid and constitutional as applied to George Henry Warren Jr., one of the two trustees, and that the tax involved was not an illegal tax but that the same was properly assessed by the respondents, as Tax Assessors of the City of Newport, on said trust estate and against George Henry Warren Jr. as trustee under the will of George H. Warren for Constance Whitman Warren because said George Henry Warren Jr. was a resident of Rhode Island, although William Greenough, his co-trustee, was a resident of the State of New York and the trust fund was located in the State of New York. The validity of said

section was denied and drawn into question by the petitioners throughout the proceedings in said cause on the ground of its being repugnant to the Constitution of the United States and in contravention thereof, for the reason that the State of Rhode Island renders no equivalent for the tax on one-half of the fund assessed against George Henry Warren Jr. as co-trustee, and renders no protection [fol. 134] and extends no benefit to the trust fund which is taxed.

Said appellants hereby designate the following parts of the record as unnecessary to be printed:

1. Testimony taken at hearing in Superior Court as set forth on pages 28, 29 and 42, 43, 44, 45, 46 and 47 of the Transcript of the record below.

2. The will of George Henry Warren which appears on pages 59 et seq. of the transcript of the record below, except Clauses Fifth and Sixth thereof which should be printed, either as part of the petition or part of petitioner's Exhibit 1.

3. Statement as to Jurisdiction which appears on Page 101 et seq. of the Transcript of the record below.

4. Petition for allowance of appeal, assignment and Prayer which appears on page 122 et seq. of the transcript of the record below.

5. Order Allowing Appeal which appears on page 124 of the transcript of the record below.

6. Appeal Bond which appears on page 125 et seq. of the transcript of the record below.

7. Praecipe which appears on page 127 of the transcript of the record below.

8. Affidavit of Service which appears on page 128 of the transcript of the record below.

9. Affidavit of Service which appears on page 129 of the transcript of the record below.

10. Citation which appears on page 130 of the transcript of the record below.

11. Return of Service of Citation which appears on page 131 of the transcript of the record below.

12. Statement of Appellees of grounds in opposition to appellate jurisdiction of above Court pursuant to Supreme [fol. 135] Court rule 12 which appears on page 132 et seq. of the transcript of the record below.

13. Affidavit of service of appellees statement which appears on page 135 of the transcript of the record below.

By their attorneys, William R. Harvey, William Greenough.

[fol. 136] AFFIDAVIT OF SERVICE

I, Lester D. Farrell, Deputy Sheriff for the County of Providence, on oath depose and say that I have made service of the Appellant's "Statement of Points to be relied upon and Designation of Parts of the Record to be Printed" on Edward L. Leahy, Tax Commissioner for the State of Rhode Island, on the 30th day of August, A. D. 1946, by leaving a true copy thereof in his hands and possesion.

Lester D. Farrell, Deputy Sheriff.

Subscribed and sworn to at Providence this 30th day of August, A. D. 1946. Before me, John J. McNealy, Notary Public. My Commission expires June 30, 1951.

Service $5.50.

[fol. 137] AFFIDAVIT OF SERVICE

I, William P. Walsh, Deputy Sheriff for the County of Newport, on oath depose and say that I have made service of the Appellants' "Statement of Points to be relief upon and Designation of Parts of the Record to be printed" on John C. Burke, City Solicitor, on the 30th day of August, A.D. 1946, by leaving a true copy thereof in his hands and possession.

Service	.75
Travel	5.00
Copy	.75
Notary	.50
	7.00

William P. Walsh.

Subscribed and sworn to at Newport this 30th day of August, A. D. 1946. Before me, Robert H. Chappell, Notary Public. (Seal.)

[fol. 137a] [File endorsement omitted.]

[fol. 138] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1946

No. 461

ORDER NOTING PROBABLE JURISDICTION—October 21, 1946.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

Endorsed on Cover: File No. 51325. Rhode Island Superior Court of County of Newport, Term No. 461. William Greenough and George Henry Warren, Jr., Trustees, Appellants vs. Tax Assessors of the City of Newport; and Edward L. Leahy, Tax Administrator of the State of Rhode Island. Filed September 4, 1946. Term No. 461 O. T. 1946.

[fol. 56] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1946

No. 461

WILLIAM GREENOUGH AND GEORGE HENRY WARREN, JR. TRUSTEES, Appellants,

v.

TAX ASSESSORS OF THE CITY OF NEWPORT; AND EDWARD L. LEAHY, TAX ADMINISTRATOR OF THE STATE OF RHODE ISLAND, Appellees

STIPULATION AND ADDITION TO RECORD

It is stipulated and agreed that the following Sixteenth clause of the will of George Henry Warren be made a part of the transcript of the record in this cause.

The Sixteenth clause provides as follows:

"Sixteenth: I hereby nominate constitute and appoint my son George Henry Warren junior and William Greenough the husband of my niece Charlotte Warren Greenough to be the executors of and trustees under this my will

"Upon the decease of either my said son or the said William Greenough or in the event either my said son or the said William Greenough shall resign or become for any reason disqualified to act as executor of and trustee under this my will before my estate has been fully administered or the trusts hereby created have been fully executed then I do hereby nominate constitute and appoint United States Trust Company of New York and its successor as executor of and trustee under this my last will and testament

"It is my will and I direct that no bond or other security shall be required by any surrogate probate court or judge of any court of or from my said executors or trustees under this my will or either of them for the performance of their duties under this my will or on account of the non-residence of any such executor or trustee or either of them."

William R. Harvey, William Greenough, Attorneys for Appellants; John C. Burke, City Solicitor, Attorney for Appellees; Irving H. Straswich, Attorney for Tax Administrator.